

***United States Court of Appeals
for the Second Circuit***



EXHIBITS

77-1064
Docket No. 77-1064

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

B
Appellee,

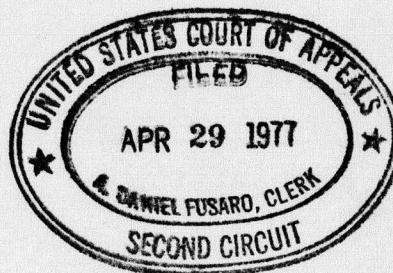
-against-

JOHN McGRATH,

Appellant.

On Appeal from a Judgment of the United States
District Court for the Eastern District of New York

APPELLANT'S REPRODUCTION OF STATUTES
AND RULES PURSUANT TO RULE 28 OF
RULES OF APPELLATE PROCEDURE



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UNITED STATES CONSTITUTION

FIFTH AMENDMENT:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

SIXTH AMENDMENT:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

NEW YORK STATE CONSERVATION LAW

"§ 1-0101. Short Title

This chapter shall be known as the 'Conservation Law'.
Added L.1964, c. 174, § 1, eff. July 1, 1964."

"§ 1-0301. Conservation Department; Continuation

There shall continue to be in the state government a Conservation Department. Added L.1964, c. 174, § 1, eff. July 1, 1964."

"§ 672. Park regions and regional park commissions

For purposes of administration of the various parks and parkways now owned or hereafter acquired by the state, the state shall be divided into ten park regions as follows:

* * * *

9. The ninth region shall consist of the counties of Nassau and Suffolk.

* * * *

Except as otherwise expressly provided in this article, the immediate jurisdiction and control of parks and parkways now owned by the state, and, unless otherwise stated by statute, of parks and parkways hereafter acquired by the state, shall be in the following authorities:

* * * *

9. The ninth region: the Long Island state park commission.

* * * *

Added L.1928, c. 242, § 41; amended L.1930, c. 527, § 1; L.1932, c. 441; L.1934, c. 297, § 2; L.1939, c. 663, § 2; L.1941, c. 689, § 1, eff. July 1, 1941."

"§ 672-a. Jurisdiction of parkways

* * * *

The Long Island state park commission shall have jurisdiction and control over the Northern state parkway, the Southern state parkway, the Meadowbrook state parkway, the Wantagh state parkway, the Bethpage state parkway, the Loop state parkway, the Ocean state parkway, the Sagtikos state parkway, the Captree state parkway, the Heckscher state parkway, the Sunken Meadow state parkway, the Montauk state parkway, and any future extensions thereof and any parkways hereafter constructed or acquired within the ninth region. Added L.1951, c. 814; amended L.1952, c. 199, eff. March 25, 1952."

"§ 774. Actions, office; employees

The commission is authorized to sue and bring actions or proceedings in the name of the people of the state of New York, to use a common seal and to make and adopt by-laws to regulate its proceedings. It shall keep a record of its proceedings which shall be a public record and open to public inspection at such times and under such reasonable regulations as it shall determine. It shall have and maintain a suitable office within the state where its maps, plans, documents, records and acts shall be kept. It may retain all necessary counsel and attorneys and may employ a secretary, engineer and such other experts, assistants and employees as it deems necessary to carry out the purposes of this part of this article. Such employees shall include one or more persons who may be employed for the purpose of enforcing law, order and the observance of the ordinances established by said commission for the government and use of the public reser-

vation under its care. Each person as and when so employed, and during the term of such employment may be uniformed, shall be designated as a 'Long Island state park patrolman' and shall be a peace officer as defined by section one hundred and fifty-four of the code of criminal procedure, and shall have, within the limits of the cities, towns and villages containing territory included within such reservation all the powers of a constable, marshal, police constable, or policeman of a city, town or village in the execution of criminal process; and criminal process issued by any court or magistrate of a county, town, city or village containing territory included within such reservation may be directed to and executed by any such patrolman, notwithstanding the provisions of any local or special act, ordinance, or regulation. The commission may also from time to time determine the duties and fix the compensation of all its employees within the appropriations made by the legislature and may appoint and remove them at pleasure and make all reasonable rules and regulations respecting the same. Added L.1928, c. 242, § 41, eff. March 5, 1928."

"§ 777. Powers of commission

1. The Long Island state park commission shall have immediate jurisdiction and control over all parks which now are or hereafter may become the property of the state of New York in the counties of Nassau and Suffolk. It shall have power from moneys or property on hand or appropriated for its use to acquire and make available for use as public parks or parkways all such real estate as is or may come under its jurisdiction and to maintain, improve and embellish such parks and erect, construct, or build thereon such structures or other improvements and appurtenances as to it shall seem proper for the purpose of establishing public parks or parkways which is hereby declared to be a public purpose. Said commission may provide for the protection and propagation of

fish and game in said parks and for the reforestation of the same. Said commission may also build, construct, operate or cause to be built, constructed or operated, necessary paths, roads, docks, wharves and bridges, causeways and viaducts, and manage and control boats and ferries in any park within its supervision or control, or to or from the same, or to or from various points within the same, and may also build, purchase and maintain boats, bath and boat houses for use within the same. Said commission shall also have the power to make and dredge waterways and channels in front of or within or appurtenant to any such parks. Said commission may also provide and operate any other facilities for the use and enjoyment of such parks by the public and for increasing the accessibility of such parks to the public as it may determine to be necessary or expedient; and the commission may establish such rules and regulations as may be proper with regard to prices, terms and conditions upon which and the manner in which such facilities may be used and may do and perform all things necessary and proper for the execution of the purposes of this part of this article.

2. Said commission shall have the power and authority within any park under its jurisdiction to propagate fish and game for the stocking of any such park; also by ordinance or regulation passed in the manner provided in this part of this article, for the passage of ordinances, to create and establish closed seasons for fish and game within any such park.

3. The commission shall have the right on behalf of the state to take in fee or otherwise by gift or devise lands or rights and interests therein for the purposes of this part of this article, or to receive gifts, contributions or bequests of money or other property to be used in acquiring or improving such park or parks, all of which gifts, devises or bequests shall be to and in the name of the state and the commission is hereby authorized in the name of the state to accept the same for any one or more of the purposes as in this part of this article provided, or to reject the same. All such moneys so given or bequeathed, unless otherwise provided

by the terms of such gift or bequest, shall be deposited by the commission to its account with a depository to be approved by the comptroller, and such deposits shall be subject to the order of the commission and applied by it to the purposes of this part of this article. The commission shall also have the right to sell timber, raw material, houses and structures of every kind and nature standing upon, or attached to lands acquired for park purposes; to grant leases at a reasonable consideration to be received by said commission and for periods of not to exceed ten years, of any land, buildings or other property acquired for park purposes by said commission.

4. The commission is also authorized to accept on behalf of and in the name of the state for state park purposes, transfers and conveyances of rights and titles now vested in the United States government to land and buildings in the counties of Nassau and Suffolk under such conditions as the government of the United States may impose.

5. The commission may and is hereby authorized to apply to the proper authorities of the state of New York, for a transfer of land under water, adjacent to any uplands under the jurisdiction or control of said commission, and the board of commissioners of the land office or other state officials authorized to make and execute grants of land under water for and on behalf of the state of New York shall and they are hereby authorized and directed to make such transfers subject to such conditions and restrictions as to said board may seem proper, such transfer to operate as an appropriation of said lands under water by the state to park uses and purposes and a bar to any grants by the state of said lands under water so transferred, or any interest in the same to any other party or for any other purpose whatsoever.

In addition to the powers hereinbefore granted to it, the said commission shall have power to improve, maintain and use the lands of the municipalities ad-

joining the parks and parkways of the commission, with the consent of the local authorities having jurisdiction thereof.

6. The commission shall have power to, and shall from time to time proceed to select, locate and acquire lands in the name of the people of the state of New York, within the limits of the above mentioned counties, or either of them, and shall from time to time proceed to make the same available for use as public parks. Such lands may be acquired by gift, agreement, condemnation or entry.

7. The commission shall have the power and is hereby given the right to agree with the owners or persons interested in any real estate in which said commission is authorized to acquire the fee or any lesser interest, for the acquisition of said real estate, or any interest therein, and the compensation to be paid therefor; and the compensation so agreed upon shall be paid out of the moneys made available as in this part of this article provided.

8. If the said commission shall be unable to agree with the owners of or other persons having an interest in said real estate, or if by reason of legal incapacity, or absence of such owners or persons interested as aforesaid, or if for any other reason, no agreement can be made for the purchase of said real estate, the same may be from time to time acquired by the commission by condemnation proceedings or by appropriation in the name of the state, except that none of the lands known as the plain or common lands of the towns shall be acquired by condemnation proceedings or by appropriation in the name of the state. In any such proceeding any municipal corporation may and it, by its governing body is, hereby authorized to consent to the taking of property by the commission for park purposes for a nominal consideration. The commission, if it shall acquire lands by appropriation, shall acquire them in the manner provided by section fifty-nine of the conservation law for the appropriation of certain lands, and all the

provisions of such section shall as far as practicable apply to the acquisition of such lands in the same manner and with the same effect as though the lands herein authorized to be acquired, were mentioned in such section. Immediately upon the vesting of title in the state, any and all leases and/or contracts in regard to such lands or waters or both so taken, or part or parts thereof, and all covenants, contracts or negotiations between landlords and tenants or any other contracting parties, shall upon the vesting of such title respectively cease and determine and all parties and/or tenants in occupation or possession of any such lands, or any part or parts thereof, at the time of the vesting of such title in the people of the state shall be, and become, tenants at will of the state unless otherwise specifically provided in the appropriation papers.

Added L.1928, c. 242, § 41; amended L.1933, c. 71, eff. March 20, 1933."

PARKS AND RECREATION LAW

LEGISLATIVE MEMORANDA

"Article 9. This article continues the Palisades Interstate Park Commission, with several important modifications. First, all of the Commission's functions, powers and duties, when exercised in New York State, would be subject to the general or specific approval of the commissioner. Second, the Commission no longer would have general authority to regulate traffic or navigation (matters which would be covered by the Office on a statewide basis, except in the sixth park region). Third, patrolmen appointed by the Commission with the approval of the commissioner, would become members of the 'New York State Park Police'. Finally, the Commission would be empowered to acquire property, in its own name, in the same manner as the commissioner. The jurisdiction over any such properties so acquired, however, could be transferred back to the Office or another State agency by special act."

"Article 13. Except for sections 13.01 and 13.03, the provisions of this article would have been taken, in somewhat modified form, from existing provisions of law. Section 13.01 is included to insure that all property, and all functions, powers and duties not otherwise continued in the State Council of Parks and Recreation or regional park commissions, are transferred to the commissioner. In short, unless a specific power, function or duty formerly exercised by the State Council of Parks and Recreation, the Palisades Interstate Park Commission or a regional park commission were specifically continued as a function, power or duty of such council or commission, it would be transferred to the commissioner under the provisions of section 13.01. The provisions of this section are particularly important, since it would assure that such powers, functions and duties, even if not specifically referred to in the bill, will be transferred to, and exercisable by the commissioner.

Section 13.03 would require the commissioner, by regulation, to maintain a list and description of all state parks, parkways, recreational facilities, and historic sites. It is intended that such list be comprehensive, and thus no exception is made for facilities which are located in the sixth park region. The maintenance of such a list would avoid the necessity of establishing new parks, historic sites, etc. by statute. Rather, such facilities would be established by administrative action, and thereafter would be included in the required list.

"Statement in support of the bill:

The bill would serve two important purposes. First, it would fulfill the mandate set forth in section 720 of the Executive Law by recodifying in a logical pattern provisions presently scattered throughout the Conservation Law and Executive Law.

Second, to create a more viable administrative structure for the coordinated management of the State's park, recreation and historic site facilities and programs outside of the sixth park region, the bill would centralize administrative power in the Office of Parks and Recreation while assuring the continuation of effective roles for citizens and experts. The State Council of Parks and Recreation, which would be freed of direct administrative responsibilities, would continue to review matters of statewide significance and to act as a central advisory body. The regional park and recreation commissions, in addition to advising the commissioner of parks and recreation on matters of local concern, would continue to have authority to promulgate rules and regulations for their respective park regions. The advisory and review functions of the State Historic Trust and the Governor's Advisory Committee on Historic Preservation would be consolidated and continued in the new State Board on Historic Preservation.

By streamlining the applicable provisions of law and creating a centralized administrative authority, the bill would strengthen the already outstanding park, recreation and historic preservation programs of the State.

The bill is part of the Governor's 1972 legislative program." (Emphasis supplied)

PARKS AND RECREATION LAW

"§ 1.03 Definitions

Whenever used in this chapter, unless a different meaning clearly appears from the context:

1. 'Office' shall mean the state office of parks and recreation.

2. 'Commissioner' shall mean the state commissioner of parks and recreation.

* * * *

4. 'Regional park and recreation commission' shall mean a regional park and recreation commission as described in section 7.03.

* * * *

L.1972, c. 660, § 1, eff. Sept. 1, 1972."

"§ 3.03 Office; commissioner

The office of parks and recreation is hereby continued in the executive department. The head of the office shall be the commissioner of parks and recreation, who shall be appointed by the governor, by and with the advice and consent of the senate, and hold office at the pleasure of the governor.

L.1972, c. 660, § 1, eff. Sept. 1, 1972."

"§ 3.05 Offices

The principal office of the office of parks and recreation shall be in the county of Albany.

L.1972, c. 660, § 1, eff. Sept. 1, 1972."

"§ 3.09 General functions, powers and duties

The office by and through the commissioner, shall:

1. Acquire and establish historic sites and objects and, except within the sixth park region, state parks, parkways and state recreational facilities.

2. Operate and maintain, either directly, or by contract, lease or license, such historic sites and objects, parks, parkways and recreational facilities.

* * * *

L.1972, c. 660, § 1; amended L.1973, c. 999, § 1;
L.1974, c. 987, § 2; L.1975, c. 96, § 2."

"§ 7.01 Park regions

The state shall be divided into twelve park regions as follows:

* * * *

9. The ninth region shall consist of the counties of Nassau and Suffolk.

L.1972, c. 660, § 1, eff. Sept. 1, 1972."

"§ 7.03 Regional park and recreation commissions

Subject to the provisions of this chapter, the several regional park commissions shall be continued as regional park and recreation commissions, as follows:

* * * *

7. The ninth region: the Long Island state park and recreation commission.

L.1972, c. 660, § 1, eff. Sept. 1, 1972."

"§ 7.11 Powers and duties of commissions

Each regional park and recreation commission shall:

1. Review the application of policy and plans of the office to the park region served by the commission and review and approve the budget for such region prior to its submission to the commissioner.

2. Adopt policies, rules and regulations applicable to its park region subject to the general policies formulated by the commissioner and reviewed by the council and in conformity with rules and regulations adopted by the commissioner.
3. Act as a central advisory agency on all matters affecting parks, outdoor recreation and historic preservation within the park region it serves.
4. Represent and convey to the commissioner and council citizen viewpoints as to the programs and needs of the park region it serves.
5. Maintain close liaison with officials of the office having administrative jurisdiction over the park region which it serves, and advise such officials on local policy, operational and budgetary matters.

L.1972, c. 660, § 1; amended L.1972, c. 662, § 1."

"§ 13.01 Transfer of parks, parkways and other property

Notwithstanding the provisions of any other law, the custody and control of all property heretofore acquired by or under the jurisdiction of any regional park commission, as defined in section 7.03, or the Saratoga Springs commission and the New York State historic trust, are hereby transferred to the office. The office shall have all of the powers with respect to such property as were possessed by the office, the several regional park commissions, the Saratoga Springs commission and the New York State historic trust on the day preceding the effective date of this act, in addition to any powers provided under the provisions of this chapter.

L.1972, c. 660, § 1, eff. Sept. 1, 1972."
(Emphasis supplied)

FEDERAL RULES OF EVIDENCE

"ARTICLE VIII. HEARSAY

Rule 801.

DEFINITIONS

The following definitions apply under this article:

(a) Statement. A 'statement' is (1) an oral or written assertion or (a) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant. A 'declarant' is a person who makes a statement.

(c) Hearsay. 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if--

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him; * * * *.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 7.

"THE INDICTMENT AND THE INFORMATION

* * * *

(c) Nature and Contents.

(1) In General. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated."

Rule 8.

"JOINDER OF OFFENSES AND OF DEFENDANTS

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan."

Rule 12.

"PLEADINGS AND MOTIONS BEFORE TRIAL; DEFENSES
AND OBJECTIONS"

* * * *

(b) Pretrial Motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

(1) Defenses and objections based on defects in the institution of the prosecution; or

(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); or

* * * *

(d) Notice by the Government of the Intention to Use Evidence.

(1) At the Discretion of the Government. At the arraignment or as soon thereafter as is practicable, the government may give notice to the defendant of its intention to use specified evidence at trial in order to afford the defendant an opportunity to raise objections to such evidence prior to trial under subdivision (b)(3) of this rule.

Rule 14.

"RELIEF FROM PREJUDICIAL JOINDER

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

As amended Feb. 28, 1966, eff. July 1, 1966."